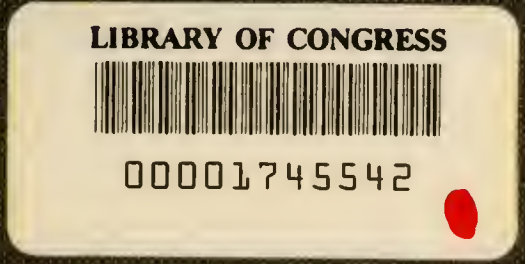
E 445
.S7 S7



MINORITY REPORT

OF THE COMMITTEE ON FEDERAL RELATIONS, RESPECTING CERTAIN RESOLUTIONS RELATING TO THE IMPORTATION OF SLAVES.

The undersigned, a minority of the Committee on Federal Relations, to whom were referred certain resolutions relating to the importation of slaves, asks leave to report:

That he has maturely considered the same, and now respectfully submits to the Senate some of the views upon which his recommendation rests. It is undeniable that this importation was the origin of the system of slavery existing in this and other Southern States. But the policy of such importation *now* is questioned, on the ground that it would be injurious to the very system which grew out of it—that a further supply of the nutriment which fed the young twig would kill the full grown tree. It is not proposed to discuss this fully, time and space forbidding it. But one objection will be considered. It is objected that this importation would be ruinous to the vested interests of the South by the anomalous process of first reducing the price of slaves, or, in other words, the cost of production, and then by reducing the price of their produce. To do which, has even been called "agrarianism." To show the error of this, the following views may suffice.

THE QUESTION OF POLICY.

It is an economic axiom that "labor is the source of value." We learn from Holy Writ, if not from our own observation and reflection, that "all flesh is grass." But there can be no labor without "flesh," nor "grass" without land. Hence to arrive at *value* we must have both labor and land. They are co-ordinate pre-requisites of production—the first cause, so far as visible agency goes, in agriculture. Upon agriculture depend all other pursuits. It produces—they consume. It supplies the raw material for, and thereby *stimulates* consumption. To cheapen or increase production, therefore, is to invite and secure, and thereby increase and extend consumption.

But the cost of production includes the cost of labor and land, and of course, a cheapening of production involves a cheapening of one or the other. Hence a comparative increase of consumption depends upon a reduction of

the *first cost.* The reason is obvious. The lower the first cost, the lower may be, and where there is competition and free trade the lower *will* be the second, third, and all succeeding costs attached to the article in its various stages of transfer, manufacture and consumption. It is thus the interest of consumers in general, that the first cost of production in general shall be low. But all men are consumers of the great staple products of the earth; some of one sort, some of another. It is, therefore, a general truth, that cheap production is to the interest of all departments of industry. That is to say: It is the interest of all "flesh" that "grass" should be abundant—cheap; of all men, that food, raiment, and all the means of subsistence should be abundant—cheap. And since it is only by labor that these can be had, it follows that it is the general interest of mankind that labor should be abundant, available, cheap.

This general position may be obnoxious to special objections. Every man wishes to sell at a high and buy at a low price. One has corn to sell—he wishes the price high; but he buys everything else he consumes, and of course, wishes the price of everything else low. The same is the case with those who sell cotton, rice, or any other property. From which it appears that every producer wishes some particular product high, and all or most other products low. And since no one particular product represents the united interests of the community, it follows that the high price of none can be the sole interest of that community. How then are these conflicting interests to be reconciled? The answer is, by letting *free trade* establish its own equilibrium. Let every particular interest, with its own special objections, find its appropriate level in the scale of progress and development, its true interest lying, not in theoretical desertation, but in a hearty and open competition, a true economy and cheap labor.

Labor, then, being in universal requisition, the quantity present in any country, as compared with the demand for its produce, may ordinarily determine its price. If this is unusually high, we may be assured there is an excessive, or at least a growing demand for produce, to meet which there is a deficiency of labor. Such deficiency, it will hardly be denied, now exists in the agricultural department of Southern industry, and particularly in South Carolina, and is the chief reason why the price of slave labor is so high. No other than negro agricultural labor is available at the South, and there are but two means of increasing it—by the natural propagation of the race here and by importing Africans. The first of these does not suffice for the wants of the country, or the deficiency would not exist; to the latter, then, alone can we look for the requisite supply.

But so far as the *price* of slave labor depends upon the quantity present, or the rate of its increase, the *means* by which an increase may be effected is of no consequence. It is an *increase in the number of slaves,* not their

nativity, which this objection contemplates. Of course, then, every means of increase is equally objectionable, and natural increase is essentially just as ruinous to the vested interests of the South as any other. This is the logical statement of the postulate upon which the objection is based. Its validity may be tested by the evidence of history.

During the last forty years some of the districts in this State have decreased in their slave population, some have been stationary, and others have rapidly increased. The five coterminous districts of Beaufort, Colleton, Charleston, Georgetown and Horry, have had but a trifling increase in their aggregate slave population, while the five other nearly coterminous districts of Abbeville, Edgefield, Richland, Clarendon and Darlington, have about doubled theirs. In 1820, according to Mills, the total value of the agricultural products of the former was $8,095,000, and that of the latter was $3,240,000. In 1850, according to the U. S. Census, the former produced less than half as much corn as the latter, and only a little over one-fourth as much cotton, being 63,000 bales less. The rice crop of the former, being 2,590,000 bushels, and the superior value of the Sea Island cotton, taken together, would probably balance the deficiency. So that if we put down the crops as equal at the present day, it appears that, whereas forty years ago five of these districts yielded but little over a third as much agricultural produce as the other five did, they have now doubled their labor and yield quite as much as the latter, whose labor has been stationary, but whose soil is nevertheless quite as productive. The undersigned submits that demonstration cannot be more conclusive of the fact that the increase in the number of slaves in these districts, so far from proving disastrous, has been the cause of their increased wealth and prosperity. The same may be said of the new South-western States. And this illustrates the fact, which should never be forgotten, that whatever the means of obtaining labor, whatever the nativity of the laborer, the effect produced upon the soil is the same under the same circumstances. Whether our negroes are raised at home, or imported from Virginia or Africa, *their labor obtains produce from, and thereby gives value to the land, and theirs alone.*

It is a fundamental truth, that, for agricultural purposes particularly, labor imparts value to the land, but it has peculiar and augmented force in slave States, where they are owned conjointly. Slave labor at the South, though transferable from farm to farm, or State to State, is of the nature of a fixture upon the soil, and the value it imparts is stable and tangible. It is subject to no contest with capital, for it is as completely possessed by capital as the land is. It is not only a fixture but a necessity, for the climate admits of no other. But not only does labor impart value to land—the products of their joint agency stimulate every department of industry. An increased value of real estate is only one result of a competent supply of labor. With

abundant labor our white population would grow apace, diversity of pursuits would follow, wages would seek the idle, the poorer classes of our white population would of necessity be benefitted by an expansion of the mechanic arts, the prosperity of the handicrafts, the introduction of factories, and the thrifty stimulus of trade; industry would replace sloth, and smiling comfort would cast out misery. A bright day would dawn upon a new and invigorated generation. Their energies would be roused to higher motives and nobler efforts, ending in far more successful results than we witness now. The winged spirit of enterprise would prosper every interest, and the people, in their social intercourse and public assemblies, would acknowledge that, after all, South Carolina has met with no disaster—the commonwealth has suffered no detriment from an increase in her resources and the number of her slaves.

But this matter of "price" is presented as a simple question which every one can answer. If a farmer, or any one else, wishes to purchase a slave, which would he prefer, paying a high or a low price? Do men buy slaves with a view to putting as much capital as possible in a given number of them, or with a view to investing the least capital, and clearing the greatest profit out of their labor? This is the true economic question. The difference of opinion in this regard seems to lie between those who measure their wealth by the high rates at which they have invested, and those who take the profits of their investment as the index of their prosperity. One view is, that since many have invested at high rates they would be injured by a reduction in price, though they have no intention to sell. The other is, that the investment is at too high a rate to yield a fair profit. That in consequence of the laws, which prohibit a competition in the slave markets of the world, the *price* of slaves is elevated far above their *value*. Many are prepared to invest at the price which unrestricted trade would establish. For the law of supply and demand, unaffected by statute law, is the only law which secures a mutual advantage to buyer and seller—it alone establishes the true level of trade and properly regulates its fluctuations. But, on the other hand, it may be answered, though it be the farmer's interest to buy at a low price, it is equally his interest to sell at a high *price*. Financially viewed, this is true. And it is by analyzing these apparently conflicting interests, which centre in every slave holder, as well as any other proprietor of property, that the solution of the question can be reached. The undersigned believes that slave labor should not be under any restriction which is not necessary for its well being and that of society—that slave property should be as open to competition, and as free from burdens and prohibitions, as any other property —that the traffic in slaves should be as exempt from Federal countenance or discountenance, from Federal encouragement or denunciation, permission or prohibition, as any other traffic—in short, that the principle of *free trade*

and low duties applies equally to cotton negroes as to cotton fabrics, to African slaves as to British wares; not that the one is so purely chattel as the other, but because the *right of property* is the same in essence, and differs only in circumstances, as other descriptions of property must. And since, whether the market be that for African slaves or British wares, the seller wishes high and the buyer low prices, the question is pertinent, how can statute law, directly or indirectly, designedly or undesignedly, elevate or depress *the price*, without favoring one or the other party to the transaction—without disturbing the compensating principle of trade—without destroying that equipoise of interest which is the only true basis of reciprocal benefit in commerce?

Besides, in the slave market, the number of vendors is exceedingly few, compared with the number of vendees; and the number of slaves sold, compared with those not sold, *and never to be sold*, is still fewer. Then, since low price is to the interest of the vendee, and high price to that of the vendor, and respectively of them only, it is evident, in the first place, that a large majority of slaveholders are interested in having the price low, and in the next place, that Southern non-slaveholders, having no slaves to sell, are not interested in high price, but possibly, at some future time becoming purchasers, may be interested in low price. Here, then, is an overwhelming majority of the Southern people not pecuniarily interested in high price; and if the rule be applied, which prescribes the greatest good to the greatest number, the question of price must be decided in favor of a reduction. The undersigned, however, does not advocate this rule. It is the duty of representative Government to defend minorities, majorities being generally able to defend themselves—but it must be done without violating rights.

Let every slaveholder ask himself whether he has sold, or expects to sell, more slaves than he has acquired, or expects to acquire, either at a nominal or real price. Has he sold more than he has bought or inherited—does he expect to sell more than he expects to buy. It will be found that a very large proportion of southern slave owners will have bought, and will expect to buy, many more slaves than they have sold or expect to sell; and thus it is again apparent that reasonably low price has the preference, and is to the true interest of the South. There can be no well founded objection to the price of slaves being high, *if it is established and regulated by the same laws which establish and regulate the price of other property*—the natural laws of trade unrestricted by statutory prohibitions. All contended for, on this score, is, that the price of slaves, like that of other property, should be determined by the safe and certain laws of supply and demand. Any intervention of Congress which affects this price, is of the nature of those protective tariffs which are so generally complained of by the South. If it is right for Congress, by prohibitory enactments, to enhance the price of slaves, for the benefit of the slaveholder who wishes a high price for his slaves, it is

difficult to determine upon what ground it is wrong for Congress, by tariff acts, to elevate the price of domestic manufactures, for the benefit of the manufacturer, who just as reasonably wishes a high price for his wares. If it is right to take money out of the buyer's pocket and put it in that of some favored seller, in one case, it is right in the other.

It may be said that these prohibitory, unlike the tariff acts, were not intended to affect the price of slave labor, and thereby protect and promote the sale of American born negroes, as those acts protect domestic manufactures. This may be true, but the *effect* assurredly is to enhance that price, by excluding foreign competition and establishing a monopoly at home. The prohibition of the importation of slaves must, of necessity, either elevate the price above the standard which foreign competition and free trade would establish, or not. If it does, whatever may be the intention, it is, in effect, protection; more, it is monopoly. If it does not, its repeal cannot injure the interests already vested in slave property, and the objection now under discussion must fall to the ground.

Another fact to be considered in this connection is, that the reduction in the price of slaves consequent upon their importation, must necessarily be so gradual as not to occasion any disturbance in business affairs. It must be remembered that no new branch of trade, no new department of industry, and no acquisition of facilities, can be so suddenly entered upon as to occasion injury to the former pursuits of men. The steam engine has totally changed the old systems of manufacture, manipulation, travel and transportation, but it required half a century to do it, and nobody ever heard of the owners of factories, cotton gins, mills, sail vessels, stage coaches and freight wagons being ruined on account of application of steam as a motive power. Witness, too, the immense tide of emigration to California and Australia, and the endless stream of gold which pours into Europe and America from those sources; though all this has been the work of but ten years, no inconvenience has been felt in any single investment, not even has our metallic currency, the most sensitive of human agencies, been disarranged. Why, then, should the importation of *labor*, the source of value, be expected to bring ruin upon the country? Negroes, it must be remembered, can not be picked up in Africa and brought to America at will. They have to be paid for, and their expenses incurred; in addition to which, no African will ever be brought here whose labor is not wanted. People do not buy, nations do not import, what is not wanted. And nobody buys negroes for the mere love of buying them. Let, then, the number imported be what it may, *they must be paid for*, and that, too, *out of the profits of interests already vested.* But if those interests can afford to import slaves, it will not be ruinous or disastrous for them to do so; and if they cannot afford to import them, it is very certain they will not.

There is a truth for which economists vouch, and which, in fact, is self-evident: "The demand for labor must exist before laborers can be employed." "Capital alone can put labor in requisition." The demand for slaves, and the capital to pay for them must exist before slaves can be imported. And, since, from the very nature of the case, this demand and capital depend upon the prosperity of the vested interests of the South, it follows that no more slaves will ever be imported than such prosperity warrants, which precludes the possibility of disastrous consequences.

In view of these considerations, the undersigned submits, without further remark, that the natural increase of the slave population of the Southern States is insufficient to supply the demand for slave labor. That an increase in the productive capacity of the South, by means of importing labor, would enhance the value of real estate; that it would, at the worst, not injure the non-slaveholder; that it would benefit the slaveholder; that it would extend the influence and area of our social and industrial systems; that it would remove an arbitrary and hurtful restriction upon slave property; that it would leave price unfettered; and that the effects, of whatever nature, must be gradual, and subordinate to pre-existing natural causes; while the number of slaves imported must be limited by the amount of capital seeking investment of that sort, and by the very nature of the demand for labor.

It is a source of gratulation with statesmen that the principles of free trade are taking root, and that the commercial world is steadily breaking down the barriers which obstruct their growth. If Southern statesmen are of the number, and their joy is founded in principle and not interest, it is a reasonable hope that they will seek to apply the principle generally. We see the world around us striving to develope every hidden or dormant resource. "Free labor" so called, is invited, at a premium, to circumnavigate the globe; it is forced, by necessity, to the conditions of a foreign hireling; and it builds up wealth for the people who have the will, the energy and the power to put it in requisition. The South, on the contrary, teeming with resources, is forbidden to look beyond her limits for any kind of labor in her fields. *Her hands are tied by her own misguided acts,* and all now urged is their re-consideration and repeal.

But it is further objected that the importation of slaves would result in over-production, and a consequent glut in the market, with a ruinous fall in the price of cotton and other produce. This is partly answered by what has already been said. The assumption of such a fall in the price of cotton is predicated on a proportionate increase in the number, and consequent fall in the *price* of the slaves employed in growing it. In other words, the fear of a fall in the price of cotton is based upon a supposition which involves a corresponding fall in the cost of producing it. Nor could such fall be *sudden*;

and it is only the suddenness in a change of business relations and liabilities which leads to disaster and loss.

But can the cotton-planting interest be such as to rely upon artificial means for remunerating prices? There is no principle which will protect *raw* cotton that will not protect *manufactured* cotton. And if protection of the former is desired at the hands of Congress, the question assumes a different phase. But while the principles of *free trade* are professed, no exceptions can consistently be made in favor of raw cotton or against African slaves. Nor is it more probable that an importation of *labor* would reduce the price of raw cotton to a more *ruinous* extent than the invention of such "*labor-saving*" machines as have been the wonder of modern times, has reduced the price of the articles to the manufacture or preparation of which they are adapted, and to which nobody objected. Does the thrashing machine and the pounding mill injure the rice planter; or the gin the cotton planter? Yet are they not the equivalents of the labor employed in the preparation of rice and cotton before their invention?

The undersigned will now, with great deference, invite the consideration of the Senate to the constitutionality of the Acts of Congress prohibiting the importation of slaves into the limits of any one of the sovereign United States.

THE CONSTITUTIONAL QUESTION.

In expressing the opinion that the Acts of Congress prohibiting the importation of slaves are unconstitutional, the undersigned acknowledges that mature investigation and reflection have changed his former opinion; he is aware, also, that it may be regarded as venturing much so to classify a course of legislation, the legality of which has not till recently been questioned. But truth and principle cannot be changed by time, neither ought error to be made rightful under its sanction, however illustrious they may be who have fallen into it. Besides, this is not the only instance in which unconstitutional measures have received the general consent of Congress. We have but to remember the "Ordinance of 1787," passed under the old confederation, as Mr. Madison truly says, "without the least color of constitutional authority;" the 25th section of the Judiciary Act, passed by the first Congress, under the present confederation, which Mr. Calhoun has shown "is unauthorized by the constitution;" the Alien and Sedition Acts, nullified by Virginia and Kentucky; the Act of 1804, prohibiting the importation of slaves into the "Orleans Territory;" the Missouri Compromise; the Protective Tariffs; the Force Bill; and the more recent open violations of the compact, to be satisfied that, in Congress, unconstitutional legislation is no new thing.

It may be safely assumed, for it would be idle to deny, that authority to

prohibit the slave trade, after 1808, is not granted in the clause of the Constitution which forbids such prohibition prior to 1808. And though this is generally conceded, this clause is viewed as evidence of the existence of the authority by virtue of some other clause. If Congress were the legislature of a sovereign State, having plenary powers over all subjects not prohibited in the Constitution, the authority would certainly have reverted after the year 1808. But Congress is not a body of this nature. Its powers are limited to those only which are expressly enumerated. Its authority is purely and essentially derivative. Therefore, if after the year 1808, it was invested with the authority it exercised, it must have been derived from, and delegated in, some one of the enumerated powers; either *expressly* or by *necessary* implication. Is it thus derived and delegated?

It is claimed to be derived from the general authority to "regulate commerce," (*i. e.* necessarily implied in that power.) But there are good reasons for denying this, which will be presently advanced. In the mean time, it is urged that the clause in question is a *qualification* of the power to regulate commerce—that it is an *exception* which excludes, for the time of its limitation, what otherwise would have fallen within the general power to regulate commerce. That this is erroneous will now be shown.

A perusal of the Constitution will satisfy Senators that in most cases where there is a qualification or an exception to a grant or provision in that instrument, it is made to accompany it.

Art. 1, sec. 2, clause 3, provides for the apportionment of representatives and direct taxes, and limits the number of representatives to one for every thirty thousand inhabitants, with this qualification or exception: "*but* each State shall have at least one representative."

Art. 1, sec. 8, clause 1, gives Congress power "to lay and collect taxes, duties, imports and excises," with this qualification: "*but* all duties, imports and excises, shall be uniform throughout the United States."

Art. 1, sec. 8, clause 11, gives Congress power "to raise and support armies," with this qualification: "*but* no appropriation of money to that use shall be for a longer term than two years."

Art. 2, sec. 2, clause 2, gives the President power, with the consent of the Senate, to appoint officers of the United States, with this qualification: "*but* the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments."

Art. 3, sec. 3, clause 2, gives Congress power to declare the punishment of treason, with this qualification: "*but* no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

Art. 6, clause 3, requires that Senators and Representatives of the Fede-

ral and State Legislatures, and all Executive and Judicial officers, shall be bound by oath or affirmation to support the Constitution, with this qualification: "*but* no religious test shall ever be required as a qualification to any office or public trust under the United States."

Now, if this clause in question was intended as a qualification of the power to regulate commerce, it is a reasonable inquiry why it was not made like the qualifications of these other powers, to accompany the grant? Why, for example, does not the grant read—Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; *but* the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited prior to the year 1808; and a tax or duty may be imposed on such importation, not exceeding ten dollars for each person? This would have certainly been more in harmony with the arrangement of the other qualifications in the Constitution.

But its history in the Federal Convention indicates that it was not so intended. The Federal compact resulted mainly from plans submitted by Edmund Randolph and Charles Pinckney. In neither of which is any mention made of the migration or importation of persons. After discussion, the plans were committed to the "Committee of Detail," of which John Rutledge was elected Chairman. When that Committee reported (August 6th, 1787), the subject was for the first time brought before the Convention. The report, so far as it relates to the powers of Congres, is based upon Mr. Pinckney's plan, both in form and expression; and the attention of Senators is invited to the following facts:

In Mr. Pinckney's plan, it is proposed that Congress shall have power "to regulate commerce with *all* nations, and among the several States." In Mr. Rutledge's report, it is provided that Congress shall have power "to regulate commerce with *foreign* nations, and among the several States;", presenting a change of phraseology. After enumerating twenty additional provisions, the last of which relates to *direct taxation*, Mr. Pinckney's plan continues: "No tax shall be paid on articles exported from the States; nor capitation tax, but in proportion to the census before directed." The report embodies, in eighteen provisions, in similar order and language, with some additions and omissions, the twenty provisions of the "plan," and follows the last, relating to direct taxation, with this: "No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited. No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken."

From this it appears that, at least at this stage of the proceedings, the

subject of importing negroes ("such persons") was acted on in connection with the taxing power. For we find it introduced in the report as *new matter*, in a clause of the original plan, relating entirely to taxes; the grant of power in relation to which is separate and distinct from that for the regulation of commerce. The phraseology of both these clauses was changed by the Committee, and if they intended the insertion of new matter as a qualification of the one, it is natural to ask why did they insert it in the other? But further: On the 18th of August it was agreed, that Congress should have, among other powers, in addition to those already agreed to, authority "to regulate affairs with the Indians, as well within as without the limits of the United States." This having an obvious connection with trade or commerce with the Indians, was afterwards embodied in the clause for regulating commerce, by adding the words—"and with the Indian tribes." If the migration and importation of persons had likewise such obvious connection, why was the clause relating to it not also included in this?

The clause relating to imported persons and taxes, as reported by the Committee, came up for discussion three days after, and a division was made. The part relating to a tax on exports was adopted, and the remainder re-committed the next day to a Committee, of which Gen. Charles Cotesworth Pinckney was the member from South Carolina. The object of this re-commitment will appear from the following remarks of delegates, which, whatever view may be taken of them, go *very far* to rebut the impression that the clause was intended as a qualification of the power to regulate commerce:

Mr. Luther Martin, of Maryland, proposed to amend the clause as reported, "so as to allow a *prohibition* or a *tax* on the importation of slaves."

"Mr. Rutledge, of South Carolina, did not see how the importation of slaves could be encouraged by this section. He was not apprehensive of insurrections, and would readily exempt the other States from the obligation to protect the Southern against them. Religion and humanity had nothing to do with this question. Interest alone is the governing principle with nations. The true question at present is, whether the Southern States shall or shall not be parties to the Union. If the Northern States consult their interest, they will not oppose the *increase of slaves*, which will increase the commodities of which they will become the carriers."

"Mr. Ellsworth, of Connecticut, was for leaving the clause as it stands. Let every State import what it pleases. *The morality or wisdom of slavery* are considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are the best judges of their particular interest. The old Confederation had not meddled with this point; and he did not see any greater necessity for bringing it within the policy of the new one."

"Mr. Charles Pinckney, of South Carolina: *South Carolina can never receive the plan* (the Constitution), *if it prohibits the Slave Trade.* In every proposed extension of the powers of Congress, that State has expressly and watchfully excepted that of meddling with the importation of negroes. If the States be all left at liberty on this subject, South Carolina may, perhaps, by degrees, do of herself what is wished, as Virginia and Maryland already have done."

"Mr. Sherman, of Connecticut, was for leaving the clause as it stands. He disapproved of the Slave Trade; yet, as the States were now possessed of the right to import slaves, as *the public good did not require it to be taken from them*, and as it was expedient to have as few objections as possible to the proposed scheme of Government, he thought it best to leave the matter as we find it. He observed that the *abolition of slavery* seemed to be going on in the United States, and that the good sense of the several States would, probably, by degrees, complete it."

"Mr. Mason, of Virginia: The present question concerns not the importing States alone, but the whole Union. The *evil of having slaves* was experienced during the late war. Had slaves been treated as they might have been by the enemy, they would have proved dangerous instruments in their hands. But their folly dealt by the slaves as it did by the *Tories.* Maryland and Virginia had already prohibited the importation of slaves expressly. North Carolina had done the same in substance. All this would be vain if South Carolina and Georgia be at liberty to import. *The western people are already calling out for slaves for their new lands, and will fill that country with slaves, if they can be got through South Carolina and Georgia.* Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the immigration of whites, who really enrich and strengthen a country. They produce the most pernicious effect on manners. *Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country.* As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects, Providence punishes national sins by national calamities. He lamented that some of our eastern brethren had, from a lust of gain, embarked in this nefarious traffic. As to the States being in possession of the right to import, this was the case with many other rights, now to be properly given up. He held it essential, in every point of view, that the *General Government should have power to* PREVENT THE INCREASE OF SLAVERY."

"Mr. Ellsworth, of Connecticut, as he had never owned a slave, could not judge of the effects of slavery on character. If, however, it was to be considered in a moral light, we ought to go further, and free those already in the country. As slaves also multiply so fast in Virginia and Maryland, that

it is cheaper to raise than import them, whilst in the sickly rice swamps, foreign supplies are necessary, if we go no further than is urged, we shall be unjust towards South Carolina and Georgia. Let us not intermeddle."

"Mr. Charles Pinckney, of South Carolina: If slavery be wrong, it is justified by the example of all the world. He cited the case of Greece, Rome, and other ancient States; the sanction given by France, England, Holland, and other modern States. In all ages, one half of mankind have been slaves."

"Gen. Charles Cotesworth Pinckney, of South Carolina, declared it to be his firm opinion, that if himself and all his colleagues were to sign the Constitution, and use their personal influence, it would be of no avail towards obtaining the assent of their constituents. *South Carolina and Georgia cannot do without slaves. As to Virginia, she will gain by stopping the importations.* Her slaves will rise in value, and she has more than she wants. It would be unequal, unjust, to require South Carolina and Georgia to confederate on such unequal terms. He said the royal assent, before the Revolution, had never been refused to South Carolina, as to Virginia. He contended that the importation of slaves would be for the interest of the whole Union. The more slaves, the more produce to employ the carrying trade; the more consumption also; and the more of this, the more revenue for the common treasury. He admitted it to be *reasonable that slaves should be dutied like other imports;* but would consider a rejection of the clause as an exclusion of South Carolina from the Union."

"Mr. Baldwin, of Georgia, had conceived national objects alone to be before the Convention—not such as, like the present, were of a local nature. Georgia was decided on this point. That State has always hitherto supposed a general government to be the pursuit of the central States, who wished to have a vortex for every thing; that her distance would preclude her from equal advantage; and that she could not prudently purchase it by yielding national powers. From this it might be understood in what light she would view an attempt to abridge one of her favorite prerogatives."

"Mr. Wilson, of Pennsylvania, observed that as the section now stands, all articles imported are to be *taxed.* Slaves alone are *exempt.* This is, in fact, a bounty on that article."

"Mr. Gerry, of Massachusetts, thought we had nothing to do with the conduct of the States as to slaves, but ought to be careful not to give any sanction to it."

"Mr. Dickinson, of Delaware, considered it as inadmissible, on every principle of *honor and safety,* that the importation of slaves should be authorized to the States by the constitution. The true question was, whether *the national happiness* would be promoted or impeded by the importation; and this

question ought to be left to the national government, not to the States particularly interested."

"Mr. Williamson, of North Carolina, thought the Southern States could not be members of the Union, if the clause should be rejected; and that it was wrong to force anything down not absolutely necessary, and which any State must disagree to."

"Mr. King, of Massachusetts, remarked on *the exemption of slaves from duty, whilst every other import was subjected to it*, as an inequality that could not fail to strike the commercial sagacity of the Northern and Middle States."

"Gen. Pinckney, of South Carolina, thought himself bound to declare candidly, that he did not think South Carolina would stop her importations of slaves in any short time; but only stop them occasionally, as she now does. He moved to commit the clause, *that slaves might be made liable to an equal tax with other imports*, which he thought right, and which would remove one difficulty that had been started."

"Mr. Rutledge, of South Carolina, seconded the motion of Gen. Pinckney for a commitment," and the clause was accordingly committed, with the view of providing for "an equal tax."

On the 24th of August, the committee reported the clause, amended, and on the next day it was changed to its present form.

The undersigned has been thus lengthy in his extracts from the debate in the Convention, because he wishes to avoid conveying an incorrect idea of its tone and scope. He now submits to the judgment of the Senate that there is nothing in it to warant the opinion that the clause was considered with reference to *the regulation of commerce*, having been committed expressly that provision might be made for "an equal tax with other imports."

The terms of the clause also evince that it was not framed with reference to the regulation of commerce. It speaks of "*persons*" whom the States then existing may think proper to admit. And, Senators, if we read the English language alike, it contemplates the slave in his capacity as a "person," not in his relation, nor in his condition as property. Its literal meaning is applicable only to "*persons.*" Now, is the admission of "persons" into this or any other State, a *commercial transaction?* Is the *permission* of a "person" to enter and serve an employer (under any condition affecting his status) a commercial transaction? The power to decide, select, "think proper" who to admit, and who not to admit into a State, is inseparable from and indispensable to *sovereignty*. Some States of this Union admit "*free negroes*" as "persons," without being charged as violating the regulations of commerce; yet they are just "such *persons* as the States then existing thought proper to admit." Now, why not other States admit *slave* negroes with the same impunity? What is there in the Constitution which

authorizes a sectional choice in selecting these persons? The power of prohibiting or admitting the importation (or migration) of "free negro" persons, so called, is not more distinctly an *element* of the sovereignty of South Carolina than the same right respecting the importation of slave negro persons is. The exercise of the one is an inalienable sovereign right, and that of the other is neither more nor less. The *status* of no man can be determined by the laws of the United States, independently of those of any one State, but the *status* of any man can be determined by the laws of any sovereign State, independently of those of the United States. Hence it is that the *status* of the imported person cannot affect the meaning of the clause in the Constitution referring to them. In fact, the power of prohibiting or permitting the importation of *slaves*, is too substantive to be a mere qualification of another. It is, as it would be respecting other persons, probably the most inviolable right of States, and can never, by mere implication, be degraded to a "commercial regulation." To illustrate this, a single question will suffice: Is there any other race or condition of men but the African slave, whose migration or importation Congress would prohibit as a regulation of commerce?

The Committee who reported the clause the second time was composed of eleven members,* of whom, so far as the undersigned has been able to inform himself, Mr. Madison is the only one who distinctly includes the power to prohibit the slave trade in the power to regulate commerce.

Mr. Martin, of Maryland, in his letter to the Legislature of his State, after mentioning the diversity of sentiment on the subject, observes:—"you will perceive, not only that the General Government is prohibited from interfering in the slave trade before the year 1808, but there is no provision in the Constitution that it shall afterwards be prohibited, nor any security that such prohibition will ever take place."

Gen. Pinckney, another member of the Committee, observed in a speech in the Legislature of this State, in reply to Rawlins Lowndes, that "on this point your delegates had to contend with the *religious and political prejudices* of the Eastern and Middle States, and with the *interested and inconsistent* opinion of Virginia, who was warmly opposed to our importing more slaves. I am of the same opinion now as I was two years ago, '*while there remains one acre of swamp land, uncleared, of South Carolina, I will raise my voice against restricting the importation of negroes.*' I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our

* Messrs. Langdon of New Hampshire, King of Massachusetts, Johnson of Connecticut, Livingston of New Jersey, Clymer of Pennsylvania, Dickinson of Delaware, Martin of Maryland, Madison of Virginia, Williamson of North Carolina, C. C. Pinckney of South Carolina, and Baldwin of Georgia.

lands with negroes, and that, without them, South Carolina would be a deserted waste. * * * By this settlement we have secured an unlimited importation of negroes for twenty years, nor is it declared that the importation shall be then stopped; it may be continued."

Mr. Madison said, in the Virginia Convention, that this clause "was a restraint on the exercise of a power expressly delegated to Congress, namely, that of regulating commerce with foreign nations;" and, in the "Federalist," he speaks of a power "to regulate commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of $10 per head, *as a discouragement to such importations.*"

Thus, while Mr. Madison is definite, the other members of the committee are either silent on the subject, or else indefinite as to where the power to prohibit the trade was supposed to lie. His evidence, therefore, must be well weighed, for it is of too much importance to be lightly received. He must have regarded the slave as a subject for commercial regulation, either in the capacity of a *person*, or as mercantile and dutiable *property*. If the former, it has already been shown that the power to regulate commerce no more includes the power to prohibit the ingress of negro slaves, than it includes the power to prohibit the ingress of free Chinese, Europeans, or any other race, class or condition of men; for, in each case, the subject prohibited is a person, and is prohibited only *as such:* or, if he refers to the slave as *property*, he contradicts himself, besides being contradicted by other delegates, and his evidence is, at least, not conclusive.

He is, for example, palpably wrong when he says in the Federalist, No. 42, that the maximum tax of ten dollars on imported slaves was allowed "*as a discouragement to such importation.*" It has already been shown that Gen. Pinckney, seconded by Mr. Rutledge, moved for the re-commitment of the clause "*that slaves might be made liable to an equal tax with other imports.*" When the Committee reported their substitute, they provided for this "equal tax" in these words: "but a tax or duty may be imposed on such migration or importation, at a rate *not exceeding the average of the duties laid on imports.*" This was changed, on motion of Mr. Baldwin, of Georgia, by striking out the last seven words, and inserting "*common imposts on articles not enumerated,*" and, finally, it was made to read "*not exceeding ten dollars for each person.*" Without referring to the short debate which took place pending these amendments, in which Mr. Sherman, of Connecticut, held "that the smallness of the duty showed *revenue* to be the object, not the *discouragement* of the importation," and, without citing the truth, that Gen. Pinckney's and Mr. Rutledge's reason for moving a commitment, Mr. Baldwin's amendment, and Mr. Sherman's observation, have the weight of four to one against Mr. Madison's version of the intention of delegates, the undersigned respectfully submits the *fact on its own merits,*

that this tax can not be regarded as any further discouragement of the importation of slaves, than a like tax on other imports is to be regarded as a discouragement of the importation of other property. *A tax which does not exceed* the "average of the duties laid on imports," or the "common impost on articles not enumerated," or ten dollars on slaves who sell for three or four hundred, *cannot have been intended by the convention as a discouragement to the slave trade.* Mr. Madison, doubtless, had that motive himself, but he was evidently mistaken when he attributed it to the whole convention. And, if he can have been so utterly wrong in this particular, it is not impossible that he was wrong in the other part of the sentence which has been quoted from the Federalist.

In the second place, if he refers to slaves as property, there is very grave inconsistency in his opinions. On the 25th of August, 1787, he thought it wrong to admit "in the Constitution, the idea that there could be property in men." But on the 9th of July, he suggested that, in the House of Representatives, the States should be represented according to their whole number of inhabitants, "including slaves," *because* that House "had, for one of its primary objects, the guardianship of *property.*" And he approved of a duty on imported negroes, thereby acknowledging them to be property, for this is not a capitation tax. The undersigned, therefore, fails to perceive any claim to confidence in the doctrine, which shirks the idea, but embraces the thing—which will not admit the "*idea*" of slavery in the Constitution, but readily taxes the *slave* as property, and gives him *a representation*, as property, in Congress; and hence cannot receive, as unquestionable authority, what is so intermixed with error and contradiction.

The Constitution, as finally adopted, provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The question is, does this necessarily imply a power to *prohibit*, *forever*, the importation of African slaves? And the answer turns on the meaning of the expression, "regulate commerce."

Mr. Charles Pinckney is the author of the expression. It was first used in the convention in the plan submitted by him, and copied into the "plan" which he said, as already cited, could not be received by South Carolina if it authorized the prohibition of the slave trade. It is clear, then, that *he* did not consider the power to *prohibit* the trade as included in the power to *regulate commerce.* And if he, the person who first introduced the expression, did not so view its meaning, it is no undue presumption for others to do likewise.

As early as February 3d, 1781, it was declared in Congress, though not formally adopted as a resolution, "that it is indispensably necessary that the United States in Congress assembled should be vested with a right of

superintending the commercial regulations of every State, that none may take place that shall be *partial* or contrary to the common interest."

In 1785, in a report submitted to the Virginia Legislature, it was declared, that "the relative situation of the United States has been found, on trial, to require *uniformity* in their commercial regulations," and that "such uni*formity* can be best concerted and carried into effect by the Federal Councils."

In 1786, the same legislature appointed commissioners to meet commissioners from other States, "to examine the relative situation and trade of the said States," and "to consider how far *a uniform system* in their commercial regulations may be necessary to their common interest and their permanent harmony." And several other States did likewise.

In compliance with the recommendation of these commissioners, the Federal Convention met in 1787, for the purpose specified. And the first additional power proposed for Congress was, "to legislate in all cases to which *the separate States are incompetent*, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," which was agreed to by the convention in committee of the whole.

These evidences of the previous intention of the parties to the compact, leave no doubt that the leading object was *a uniform system of laws* for the regulation of the commerce of each State, and since the separate States were *incompetent* to secure such uniformity, inasmuch as no one State could pass laws regulating the commerce of another, it was necessary that Congress should be authorized to enact such laws. In other words, what was meant by Congress *regulating* commerce was, that it should prescribe a uniform system of laws for its promotion and security.

But it was objected by Messrs. Butler and Rutledge, of South Carolina, that "the vagueness of the term (incompetent) rendered it impossible for any precise judgment to be formed," and they urged that there should be "a specification of the powers comprised" in the proposition. Accordingly, when the committee of detail reported, the powers of Congress were all specified, in nearly the same language as that used by Mr. Pinckney in his plan, prominent among which was the expression "*to regulate commerce.*" With this insight into the general object in view at the time of the sitting of the Convention, and with this knowledge of the authorship of the expression, it will not be difficult to understand its meaning.

In general terms, the regulation of commerce is admitted to include rules for navigation, the construction and establishment of buoys, roadsteads, lighthouses, and other commercial facilities; the decision of the proportion of passengers to tonnage, and a variety of other things necessarily implied in enforcing the general power and in attaining the general object. But in

every instance the act is prescriptive, or declaratory of what is deemed the best means of *promoting* the commercial interests of the country. The regulation of commerce must be admitted to extend to every species of traffic, to every sort of transportation, and to every class of agents employed. But what is the *motive*, the great ulterior *object* of these regulations? Certainly it must be the preservation, the encouragement and security of every branch of trade and transportation, and of every agency. Chief Justice Marshall sums it up in a sentence. Commerce, he says, "describes the commercial intercourse between nations and parts of nations, *in all its branches*, and is *regulated by prescribing rules for carrying on* that intercourse." With this understanding of what is comprehended among the *subjects* of commercial regulation, and what is the general *object* of such regulation, the undersigned assumes that the expression has the same meaning in its three several applications in the Constitution, with such manifest limitations as will now be mentioned.

Congress has put a correct interpretation on its general power to regulate commerce with the Indian tribes. Under the old Confederation, in 1786, an ordinance was passed for the regulation of the Indian trade, by which a system of licenses were granted to American citizens of good repute to prosecute the traffic. Again in 1790, '96, 1802, '16, and at other times, additional regulations were adopted, the distinguishing feature in which was a tendency to keep the trade in the hands of American citizens. The reason is obvious. The Indians are ignorant and warlike savages, independent tribes living within our national jurisdiction, and if allowed free intercourse with such foreign or other persons as may be evil disposed, the consequences might be hurtful to the peace and tranquility of the country. The regulations are, as they should be, peculiar to the circumstances of the people, but designed to encourage and promote, not to *prohibit*, a peaceful intercourse. Mr. Calhoun, in one of his reports from the War Department, observes that the Indian trade "was commenced, and has been continued from motives both of prudence and humanity." And all the rules for its regulation were designed for its "*successful and safe prosecution*," not its prohibition.

Congress has also enacted laws for "carrying on" commerce among the States, for its "successful and safe prosecution," but not for its prohibition or destruction. It *regulates the slave trade* among the States. One Act, for example, requires vessels transporting slaves coastwise, to be of at least forty tons burthen; and all the requisite papers have to be signed by the proper officer of the customs. This and other Acts comprise that uniform system of regulations for continuing, preserving and "carrying on" commerce, "*in all its branches*," among the States, which it was intended Congress should establish.

The authority of Congress, however, over the commerce between the States, though just as supreme in its nature as that over commerce with foreign nations, requires a few words of explanation in order to be properly understood. The expression "among the several States" is a restriction of the *jurisdiction* of Congress to the external intercourse between the States. This jurisdiction extends, for example, to the navigation between the ports of the different States, provided it is conducted on the high seas, or large lakes and rivers connecting more than two States, but not if it is carried on overland. And this inland trade is a necessary and unavoidable exception. In the one case, the channel of trade, the line of transit, the route or highway, is beyond the jurisdiction of either of the States concerned, and of necessity is under the joint jurisdiction of all the States, vested in the Federal Government, in the form of an exclusive admiralty jurisdiction; while in the other case, trade is carried on under the exclusive jurisdiction of the State within whose limits "the subject, the vehicle, the agent and their various operations" happen to be. The moment they cross the boundary line of two States, they pass from the jurisdiction of one to that of the other, and *Congress* can by no possibility regulate the intercourse, though the Federal *Courts* may have cognisance of certain cases arising out of it. But with this necessary restriction of its jurisdiction, growing out of the compound nature of our government, the power of Congress to regulate commerce among the States, and with foreign nations, is precisely the same, embracing every description of property, "subject, vehicle and agent." Of course, the slave trade, which is an important branch of commerce among the Southern States, must be included.

It is true, some distinction has been sought to be made between domestic and foreign commerce in the item of slaves. Among other instances, it was held, in the case of the United States *vs.* Bates and others, (Columbia, December, 1858,) respecting the domestic trade. "All that can be done by Congress in such a matter is, that it may regulate the transportation, as it has been done, to a certain extent; Congress may *regulate it as to the manner in which it may be done*, so as to prevent the conveyance by sea from becoming a facility for the escape of fugitive slaves; to proportion the number to be sent to tonnage, to insure a safe and humane transportation, and in other particulars of a like kind; and to prevent the transportation from being made a cover for the introduction (*smuggling*) of slaves from foreign places to the United States, and, *above all*, to secure to the slave owner the transportation of his slaves by sea, and his right of property in them from any interference whatever by the cruisers or ships of foreign nations." This the undersigned contends is in substance likewise, "all that can be done by Congress" in the matter of the slave trade with foreign nations. Congress may forbid the *smuggling*, but not the importation of slaves, and

"regulate it as to the manner in which it may be done." The regulation of commerce is the exercise of a general power, and is intended for general purposes—it is designed for the common good and equal benefit of the States. But slave property is not common to all the States—it bears the same relation to commerce in general as the produce of any section does. And no reason has yet been assigned why the traffic in it can be *prohibited* with any more propriety, as a commercial regulation, than the traffic in rice, sugar, tobacco, or any other property peculiar to any one State or section of the Union, can be so prohibited. Nor can the prohibition of one be any more general or less special than that of the others. If it is admitted that Congress cannot prohibit the introduction of slaves from Virginia into Texas as a commercial regulation, *because* Texas allows slavery, and Virginia allows slavery, the same reason holds if the slaves come from anywhere else where slavery exists. If the right of a State to permit her citizens to own slaves, disarms Congress of power to prohibit their introduction from any other State, under the general power to regulate commerce among the States, it must, in the absence of any special constitutional provision, also disarm Congress of the same power respecting slaves from foreign slave countries. The right to *prohibit* and to *permit slavery* are co-relative, co-existent and inseparable, and it is admitted that the right to abolish slavery within its own limits, which every State in the Union possesses, "carries with it the right to forbid within its limits the importation or introduction of slaves, for the purpose of sale, traffic or use." Thus the right to forbid the introduction of slaves is only a modification of the right to prohibit slavery, or the holding of slaves, and in the case of a new State its exercise would be tantamount to such prohibition. So, too, the right to admit the introduction of slaves is a modification of the right to permit slavery, or the holding of slaves, and in the case of a new State, its exercise is tantamount to such permission. And the right to prohibit and to permit the *introduction* of slaves are also co-relative, co-existent and inseparable. It follows that since the right to *permit* the introduction of slaves rests solely with the States respectively, the right to *forbid* their introduction rests solely with them likewise, and can no more be *implied* in any power granted to Congress than the right to forbid slavery, each right of prohibition being co-relative, co-existent and inseparable from the corresponding right of permission.

The truth is, slavery, with all its adjuncts, is a local and a State interest, and for Congress to *prohibit* either, is to legislate for local and special purposes. It may regulate the traffic, and must protect the property from foreign assault, but it cannot abolish either without usurping the right of the several States. The Federal Government was established for general purposes only; purposes to effect which the several States were "incompetent," and for the

preservation and upon the basis of *strict equality* among the States as sovereigns. In commercial intercourse with each other, and with foreign nations, equality of rights and uniformity of practices were the aim of the parties to the federal compact. For example :

It forbids that a "preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State, be obliged to enter, clear or pay duties in another." Thus, whatever is the subject of regulation, whatever the nature of the property imported or exported to or from one State, whether of domestic or foreign origin, it must, so far as Congress can control it, be allowed to be imported or exported to or from any other State. This puts the several States on a footing of perfect commercial equality, so far as any lawful action of the Federal Government is concerned.

It also forbids that any State "shall enter into any treaty, alliance or confederation," or "without the consent of Congress, lay any duty of tonnage, or enter into any agreement or compact with another State, or with a foreign power," and thereby puts the several States on a footing of perfect commercial equality, so far as any lawful action of a State Government is concerned.

And, to complete the arrangement, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." This secures to citizens of each State, the privilege of trading and bartering, in any State, such goods, commodities, or other property, as shall not be prohibited by the municipal laws of the State in which the traffic is proposed to be conducted; and renders effective the principle of equality and uniformity, both as it affects the subjects, the vehicles and the agents of commerce, which was the paramount purpose for which the Federal Government was erected.

It will not, then, be denied, that, *so far as federal law extends*, whatever property can be lawfully bought and sold, in commerce with foreign nations, must be a lawful subject of trade among the States. The provisions just cited render this unquestionable. But, is not the converse of this true also? Is not that property, which can be lawfully bought and sold, in the commerce among the States, and *the prohibition of which is confessedly excluded from the power to regulate that commerce*, likewise a lawful subject of commerce with foreign nations? And is not its prohibition, *also*, excluded from the power to regulate *that* commerce? The undersigned believes it is, and that the Constitution regards the property entering into the commerce among the States, whatever its nature, as a legitimate subject of commerce with foreign nations—if recognized by their municipal laws. That any description of property, which may be exported or imported to or from foreign nations, or imported from one State to another, may also be exported or imported to or from foreign nations. No exception is either expressed or necessarily implied in the Consti-

tution, and, of course, slaves are included, for they *are* recognised as property in that instrument. Excepting, then, only such property as may be prohibited by the municipal laws of any State or foreign nation, by virtue of its exclusive sovereign right, the commerce with foreign nations, and among the States, embrace the same subjects. It remains to enquire, whether they are not to be regulated with the same object.

Having seen that to "regulate commerce" with the Indian tribes and among the States, means to prescribe rules for "*carrying on*" *every branch of it*, and not for prohibiting any—for securing its "successful and safe prosecution," and not for its annihilation, we have a right to assume, that the same words, in the same sentence, and in the same connection, when applied to foreign nations, means the same thing. And for this assumption, the grounds are ample.

Cases may, perhaps, arise in which the regulation of foreign commerce involves a power to prohibit, for a limited time, some branch of it, for the general interests of commerce; but if any, they are rare, and the prohibition must be for a limited time, and *purely for commercial purposes*—for the advancement of commerce in general, *and for no other purpose.* But the acts prohibiting the slave trade are not limited as to time—they prohibit *forever*; and they were not passed for commercial purposes, but through motives of what was regarded humanity, philanthropy, morality or anything but those of a commercial nature; hence they are not among these exceptional cases.

Besides, if by virtue of its general authority Congress can prohibit any one branch of commerce, why may it not prohibit another? Or if it can destroy it with foreign nations, why may it not, by virtue of the same authority, conjointly granted in the same clause, destroy it among the States? What limit is set upon its discretion? What restricts its prohibitory power to any particular traffic? Is not the power to regulate general? Is it not the same as regards every branch of trade? Are not foreign and inter-State commerce equally subject to the regulations of Congress? It is urged that, but for the restriction in the Constitution relative to the importation of *persons*, Congress could, immediately upon its adoption, have prohibited the importation of *slaves.* Now, if this is true, it must be true of any other persons or property, respecting which there is no such restriction, for the declaration that a certain act shall not be done prior to the year 1808, is not a declaration that it could otherwise have been done, nor that it can be done after that time. It leaves the question open, as will be presently shown, and therefore, as already shown, the clause respecting the importation of persons is no grant of power. The prohibitory power of Congress must be general and the same respecting all property, and both foreign and inter-State commerce. If there is power to destroy in one case, there is in all others, and

if Congress, under the plea of regulating commerce, can prohibit the slave trade with foreign nations, the undersigned has not yet seen a reason assigned why it cannot do the same under the same plea, among the States, and with respect to other property.

Another ground for the assumption that the word "regulate" means the same thing as applied either to foreign or inter-State commerce, and does not mean prohibit in any case is, that it is used in other parts of the Constitution, and can in no instance, by any possibility, involve the idea of destruction or permanent prohibition. Congress has power to "coin money, *regulate* the value thereof, and of foreign coin, and fix the standard of weights and measures," yet no one will contend that it thereby derives power to *destroy* "the value thereof," or to *prohibit* the importation of foreign coin. It also can "make rules for the government and *regulation* of the land and naval forces," but this does not involve power to *destroy* the forces. How can that be regulated which is prohibited or destroyed? Congress, undoubtedly, may disband the forces, but the power to do so is incident to its power "to raise and support armies," and "to provide and maintain a navy." The power to regulate obviously exists only when the forces are raised. Regulation implies the existence, not the destruction of the thing regulated.

It is also provided that "the times, places and *manner* of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter *such regulations*, except as to the places of choosing Senators." This use of the word is conclusive of its meaning; and as in these, and other instances, it cannot mean destruction or permanent prohibition, it is yet to be shown why its meaning should be different in the only remaining instance of its use in the Constitution. It is used, for example, in the fourth and eighth sections of the first article, and applies to twelve different subjects of legislation. With regard to eleven of these, viz: the time, the place, the manner of electing Representatives; the time, the manner of choosing Senators, the army; the navy, domestic coin, foreign coin, commerce with the Indian tribes, and commerce among the States—it is certain it does not include the power to destroy or permanently prohibit; and the undersigned is aware of no reason why this power should be included in the twelfth, viz: the regulation of foreign commerce.

The authority of great names, too, may be cited on this point. In the case of Groves & Slaughter, Mr. Clay argued, as the undersigned already has, that the authority over commerce was granted to Congress solely for the purpose of making "uniform and equal regulations" for the preservation, and not destruction of commerce. He said, in substance, that the object was "to regulate commerce; to sustain it, not to annihilate it. It is conservative. *Regulation implies continued existence*—life, not death; pre-

servation, not annihilation; the unobstructed flow of the stream, not to check and dry up its waters." "The right of the States to regulate the condition of slaves within their borders is not denied. Every State may, by its laws, fix the character and condition of slaves. The right of Congress to regulate commerce between the States, *which may extend to the regulation of the transportation of slaves* from one State to another, as merchandise, does not affect these rights of the States.

Mr. Webster advanced similar arguments in the same case, and in the case of Gibbon & Ogden he said that the prevailing motive in adopting the Constitution was to place commerce "under the protection of a *uniform law*. * * * The topic urged on all occasions was the state of trade and commerce. To *benefit* and *improve* these, was a great object in itself. * * * Congress is to *give the rule, to establish the system*, to exercise the control over the subject." And, in one of his speeches in the House of Representatives, during the thirteenth Congress, he ably contended that, in the sense of the Constitution, "*the right to regulate does not carry with it the right to destroy*. That though Congress had the power to *regulate*, it could not *abolish* trade." These views were recited to him in the Senate in 1850, and he did not repudiate them, after the lapse of a quarter of a century.

Mr. Jefferson, in his report on commerce and navigation, in 1793, speaks of the "*regulations*, duties and *prohibitions*," of foreign nations, evidently using the terms as meaning different things.

But Mr. Calhoun has suggested the best and, perhaps, the only test by which the meaning of the expression, in the constitutional sense, can be determined. In his report to the Senate on the Memphis memorial, he reasons thus: "What power would a fair interpretation of the terms 'regulate commerce' confer on Congress? Or, to express it more fully, what power did the framers of the Constitution intend to delegate to it in using these terms? * * * There are few words in the language, when thus used, more vague than the verb *to regulate*. It has, as commonly used, all the shades of meaning, from the mere power of prescribing rules to that of having unlimited control over the subject to which it is applied. Nor is the term *commerce* free from ambiguity when so used. It sometimes means trade simply; and, at others, trade and transit, or navigation when the transit is by water. But the case is different when they are applied to constitutional or legal subjects. When so applied, their meaning is so much more precise that they may be regarded as almost technical. They occupy a large space in our own code of laws, and that of the country from which we derive our origin and language. And what contributes still more to the precision of their meaning is, that they occupied a prominent place in the discussion which preceded and led to the revolution that separated the two countries. * * * Many of the framers of the Constitution were able

statesmen and learned lawyers, took an active part in the discussion, and were familiar with the meaning of the terms, as *politically* and *legally* applied at the time. Under such circumstances, it is a fair presumption that in using them in delegating the power, *they intended to attach a meaning to them similar to that in which they had been in the habit of employing them in their political discussions, and in which the States had been accustomed to use them in legislating on the subject of regulating commerce prior to, and subsequent to, the revolution.*"

"Assuming such to be the case, your Committee are brought to the question: What powers were the States accustomed to exercise *in regulating their commerce* before and at the time of the adoption of the Constitution, as far as they relate to its safety and facility? The answer will solve the question as to the true meaning of the terms, and the kind of powers intended to be delegated to Congress in reference to them."

Adopting this reasonable test, the undersigned will proceed to show whether the States of this Union, prior to the adoption of the Constitution, or Great Britain at any time, prohibited the importation of slaves "*in regulating their commerce;*" or whether it has not, in every such case, been done as an act of sovereignty, in right of which, all States may allow or prohibit the migration or importation of any class, race or condition of men.

Virginia forbade importation soon after her independence, but not as a regulation of commerce. Mr. Jefferson says, in his "notes:" "In the very first session held under the Republican Government, the Assembly passed a law for the *perpetual prohibition* of the importation of slaves." He gives the motive; it was to prevent as much as possible the increase of *slavery*, not in any way to affect *commerce*. And he predicts the effect:—"This will, in some measure, stop the increase of this great political and moral evil, while the minds of our citizens may be ripening for a complete emancipation of human nature." Here are the act, the motive, and the desired effect, neither of which involves the thought of regulating commerce. Again, in 1792, Virginia forbade the ingress of slaves from *any of the United States*, which certainly was not a regulation of commerce.

It is not ten years since Senator Mason, of that State, had occasion to substantiate this. He said, in the debate on the slave trade in the District of Columbia, that "it was, at one time, the policy of Virginia to prohibit the increase of the slave population within her territory. It was a policy which was adopted in the spirit which Virginia then entertained, of preventing, as far as practicable, the increase of that population. That policy she has since been obliged to change. Virginia, I think, was among the earliest States, after the present Constitution was formed, which, in advance of the law of the United States prohibiting the importation of slaves from abroad, pro-

hibited the importation within its limits, of slaves of that description. In 1792 was passed an Act declaring that 'slaves which shall hereafter be brought into this Commonwealth, and kept therein one whole year together, or so long, at different times, as shall amount to one year, shall be free. * * * The policy of this law was, *in no manner whatever, to effect commerce in slaves. It had no such design, no such purpose.* It left slaves to stand exactly where they had previously stood, subject precisely to the same commerce that other property is subject to."

It is thus apparent that Virginia did not prohibit this importation as a regulation of commerce, but in the exercise of a higher prerogative, and a dearer right—that of determining who shall be allowed residence and protection within her limits. This is an inalienable right of sovereignty, having no connection or similitude whatever with commercial affairs, and it is impossible that so high, substantive and essential a power, can have been delegated to Congress, by mere implication, in a clause on a totally foreign subject.

Other States did the same as Virginia. South Carolina passed a similar Act, the same year, (1792). The reason is set forth in a preamble—"Whereas, it is deemed inexpedient to increase the number of slaves within the State, in our present circumstances and condition." Not a word is said about commerce or trade. In 1787, before the adoption of the Federal Constitution, the importation was stopped, for a similar reason. Other prohibitory acts were passed in 1794, 1796, 1798, 1800, 1801 and 1816, none of which were ever claimed as commercial regulations.

Maryland did likewise, and for like reasons, in 1796. Massachusetts, during the old confederation, abolished not only the slave trade, but slavery, also. The ordinance of 1787 followed. New England and the Middle States followed the example, all aiming at the *abolition of slavery*, and none at the *regulation of commerce*. This is incontrovertible.

And how was it with Great Britain, the country to which Mr. Calhoun refers, as the one "from which we derive our origin and language?" Did Parliament abolish the slave trade as a regulation of commerce? It is hardly necessary to answer in the negative. This was the very point at issue when the matter was first discussed, during the session of 1787–8; *ought the trade to be regulated*, or ought it to be *abolished?*

Mr. Pitt, in opening the debate, said, "two opinions had prevailed without doors, as appeared from the language of the different petitions. It had been generally thought, that the African slave trade ought to be *abolished*. There were others who thought it only stood in need of *regulations*." His object was to enable Parliament to determine "whether the whole of the trade ought to be abolished; and, if so, how and when. But, if it should be thought that the trade should only be put under certain regulations, what those regulations ought to be, and when they should take place."

Mr. Fox, in the same debate said that, "as for himself, he had no scruples to declare at the outset, that the slave trade *ought not to be regulated*, but *destroyed*."

Mr. Burke said, "he thought it ought to be *abolished*, on principles of humanity and justice. If, however, opposition of interests should render its total abolition impossible, it ought to be *regulated*, and that immediately."

Mr. Gascoyne, a member for Liverpool, representing a constituency largely engaged in the trade, thought its *abolition* impracticable, but he wished to see some *regulations* adopted.

Sir William Dobbin "did not wish to enter into the discussion of the general question of the *abolition* of the slave trade." He wished merely to propose "some *regulations*" which, he thought, "should be adopted." And, finally, a bill for the *regulation* of the slave trade was passed, and the importation continued twenty years—the term "regulate" being notoriously used throughout the debate in contradistinction to the term "abolish," or "prohibit."

At a subsequent session, Mr. Wilberforce declared himself, repeatedly, in the most positive terms, opposed to every *regulation*, and to any action whatever short of "a total abolition of the trade." So far from viewing the measure as a regulation of commerce, one of his chief arguments was, that it would not affect commerce generally. He had the candor to avow his object openly; he said, "I will gradually produce the abolition of *slavery*, by immediately abolishing the *slave trade*; and I will never cease from prosecuting my plan till the object shall be accomplished."

Three of the leading Aldermen of London, members of the House of Commons, believed that "this trade might, undoubtedly, be put under wholesome *regulations*, and be made productive of great commercial advantages," but they could never consent to its *abolition*.

Lord Russell was "against the *abolition*;" but said "whenever a bill of wise *regulation* should be brought forward, no man would be more ready than himself to lend his support."

It was even contended that the trade was not a branch of commerce, and, of course, could not be regulated as such. Mr. Addington, Speaker of the House of Commons, "wished to see the slave trade abolished. Indeed, it did not deserve the name of trade. It was not a trade, and ought not to be allowed."

Mr. Fox said, "with regard to the *regulation* of the slave trade, he knew of no such thing as a regulation of robbery and murder."

Mr Thornton said, "it was war, and not trade. It was a mass of crimes, and *not commerce*."

These are fair specimens of the tone of the discussion in Parliament; and it is impossible to deny that the terms "regulate," and "abolish," or

"prohibit," were used in contradistinction throughout; or to affirm that either party viewed the prohibition of the slave trade as a regulation of commerce. Judging, then, the meaning of the expression, as used in the Constitution, by the test laid down by Mr. Calhoun, (i e.) by *the current political and legal understanding of it, in the several States and in Great Britain, at the time*, it seems plain that it does not include the power to prohibit or abolish.

But what, after all, was the avowed object of Congress itself in prohibiting the trade. Was it to regulate commerce? The whole discussion in that body from first to last, breathes the sentiment of *abolition*, not regulation. The first abolition petition ever presented was aimed at the slave trade (Feb., 1790.) Mr. Franklin, the President of the Pennsylvania Quaker Abolition Society, prayed Congress that it would "promote mercy and justice towards this distressed race, and that it would step to the very verge of the power vested in it for discouraging every species of traffic in the persons of our fellow men." The memorial arose "from the persuasion that equal liberty was originally the portion, and is still the birthright of all men," and it referred, for authority, not to the power to regulate commerce, but to the "important and salutary powers" for "promoting the welfare, and securing the blessings of liberty to the people of the United States." The object, as avowed by the friends of the memorial, was "to abate the horrors of slavery," not to regulate trade.

Again, in 1800, even the vagabond negroes of Philadelphia undertook to petition Congress, and enlighten that body respecting the "dignified nature of man." They thought humanity, not commerce, required a repeal of the fugitive slave law, and a stop to the African slave trade. And the Act of that year was passed because it was thought "it would be extremely dishonorable in a country like this, to affirm such a trade, so contrary to all those principles held dear in the United States," and not because it was essential to the commercial interests of the country, or a proper regulation of trade. Mr. John Rutledge, a member from this State, gives the correct version of the whole object of legislation on this subject. In the course of debate, he observed, "the different States which had heretofore imported those people, had established the policy not to import any more; but, in addition to this willing restriction, the Federal Government thought proper to prevent the trade being carried on by our ships to those countries which did suffer their importation. This was going very far, indeed; but so far it was thought proper to go, *to furnish a peace offering to those philanthropists whose urgency was great to accomplish the general destruction of the trade.*"

The next agitation of the subject was in 1804. South Carolina, in the exercise of her inalienable sovereign right, had repealed her Acts prohibiting the importation of Africans; and the Louisiana Territory had been

acquired. The latter occasioned the gross usurpation embodied in the 10th section of the Act erecting Louisiana into two territories, which Congress was obliged afterwards to repeal. But the Legislation of this State incurred for her the indignation of Congress Mr. Bard, a Representative from Pennsylvania, proposed "that a tax of ten dollars be imposed on every slave imported into any part of the United States," and assigned his reasons. He said, "the tax will have two effects—it will add something to the revenue, and *it will show to the world that the General Government are opposed to* SLAVERY, *and willing to improve their power, as far as it will go, for preventing it.* * * * In my opinion the importation of slaves is hostile to the South. To import slaves, is to import enemies into our country. * * It is in direct contradiction to the principles of morality."

The proposition was renewed in 1806, by Mr. Sloan of New Jersey, and the friends of the measure again avowed the object to be "not revenue, but an expression of the national sentiment." "As to revenue, it is no object to me. I have another and a higher object; to express our disapprobation of this traffic, to manifest to the world that, as the representatives of a free people, we will, as far as we can, express our opinion of it." And in discussing the Act prohibiting importation after 1st January, 1808, there was a great diversity of opinion—a large proportion of members refusing to acknowledge that there could be property in men, or that slaves could be regarded as articles of commerce. So prevalent was this opinion, that Mr. Quincy of Massachusetts had to advance an elaborate and ingenious argument to show that though in fact imported negroes were *not* property, yet it was necessary to use an "*appropriate commercial term.*" He urged that they should be "*forfeited,*" and taken by the revenue officers as in the case of smuggled goods, *not because* they, like those goods, were *property*, and articles of commerce, but, as he expressed it, "*because forfeit is the technical word* for getting the control of them, and the only certain way of *making them secure of your humanity;*" "of *giving efficiency to the rights of man*, in respect to the persons so imported"—thus acknowledging humanity and the rights of man to be, in fact, the subject of legislation, and commerce only a technical cloak. In short, the whole record shows that a limitation of slavery was the object, not only entertained by all, but avowed by most; only a few member ever alluding to the Act as a commercial regulation, and then only to cover themselves with a technical cloak.

In view of these facts, the undersigned respectfully submits that these prohibitory Acts were intended by the great majority of Congress, from first to last, as "*peace offerings*" to philanthropy, and not regulations of commerce. Offerings, however, which bring no peace. Every intelligent citizen of the United States knows that on this subject of slavery there is, and can be, no peace while the Union endures. There is none, and never

has been. No political party organization can secure it. No sectional movement short of dissolution can secure it. No administration can even invite it. Every effort must be vain. For no offering, no Congress, no human power can unite in the bonds of peace, what God has put asunder—the infidel abolitionist and the slaveholder—the hireling and the slave States—the North and the South.

The Supreme Court and the District Courts of the United States, are regarded as the *official* interpreters of the Constitution. There are two decisions to which the undersigned now invites attention, as being either contradictory and irreconcilable, or else affording, when considered in connection, conclusive evidence that Congress has no authority to prohibit the slave trade by virtue of its power to regulate commerce. In the case of *Groves and Slaughter*, directly involving this question, it was decided that the State of Mississippi had the right to "forbid the introduction of slaves within her limits as merchandise, from any other State." This, of necessity, is true of all the other States; and, as a natural consequence, applies also to the introduction of slaves from any foreign nation. And since this prohibitory power belongs to the States severally, it would seem to follow that it does not belong to Congress, either as a regulation of commerce among them, or between them and foreign nations. The powers reserved to the States respectively, are not delegated to their joint agent, the Federal Government; and those delegated to the latter, are not reserved to the former. It is impossible that any such substantive power as this can rest with both. In this case Chief Justice Taney, and Mr. Justice McLean, went so far as to say that "the power to regulate traffic in slaves, between the different States, resided in *the States separately and exclusively*—that *the Constitution did not consider slaves as merchandise*, and that the action and regulation of the several States on this subject, did not trench upon the power of Congress to regulate commerce among them, and could not be controlled by it."

In the case of *Gibbon and Ogden*, it was decided that the power to regulate commerce among the States, vested *exclusively* in Congress. And therefore no State had a right to make any commercial regulation between itself and the other States. This, of course, applies also to commerce between a State and foreign nations. Now, if the slave trade is a branch of commerce, there is no ground for assuming that it is an exception; it must be included. If it is not a branch of commerce, it cannot be regulated by Congress *as such*. But in spite of the eminent authority just cited, it is known that Congress *does* "regulate traffic in slaves between the different States," "*as to the manner in which it may be done.*"

Here are two decisions which have never been disputed as incorrect. One confirming the right of a State to *prohibit* the importation of a certain description of property, and the other denying the right of a State to *regulate*

the branch of commerce in which such importation is included. And since they are both correct, they cannot be contradictory or irreconcilable. How, then, are they reconciled? By simply admitting the fact, that *the prohibition is not a regulation*. This admission reconciles them completely, and is the only means by which they can be reconciled. Thus reconciled, they establish what the undersigned urges—that the power to regulate commerce does not authorise Congress to prohibit *any branch of it*—that the prohibition of the importation of slaves into one State from any other State, or from a foreign nation, is the exercise of a right reserved to each State, respectively—an inalienable sovereign right, and not one delegated to Congress—and hence, that it is not an act for the regulation of commerce, either among the States or with foreign nations, in the sense of the Constitution.

But further—the several States having the right to prohibit the importation of slaves from any source, suppose that each prohibited both the foreign and inter-State importation. This, it must be admitted, would not be a regulation of commerce, either with foreign nations or among the States. Now, suppose that, instead of the States acting thus separately, their joint agent, Congress, did precisely the same thing. Would that be a regulation of commerce? Does the essential nature of the act change according to the agency by which it is performed? If it is not a regulation of commerce in one case, what makes it such in the other?

Having now adduced what appears to be evidence conclusive of the meaning of the term "regulate," as used in the Constitution, the undersigned submits to the judgment of the Senate, that the buying and selling of slaves is an adjunct of slavery, an incident in the system; and the power to prohibit the adjunct, or abolish the incident, can be rightfully exercised by no other than the sovereign power which, alone, may abolish the institution itself—the States respectively. That Congress has full power to make regulations for the uniform, safe and successful prosecution of the trade both among the States and with foreign countries; but that it has no power to prohibit it, and, therefore, that all acts to that effect are unconstitutional.

It has been suggested that the power of declaring what articles of commerce shall be contraband of war, illustrates a discretionary power, at any time, to forbid traffic in such articles. In the case of the United States *vs.* Bates and others, it was held that, "if the power to *prohibit* was not involved in the power to *regulate* commerce, a state of war reveals its inadequacy to the necessities of that occasion. In prohibiting, by declaring certain articles of commerce contraband, power is exercised, often indispensable to the safety of a State or nation. It is true that an illustration, drawn from a state of war, is derived from an exceptional period in the history of our country; but if it exists then, it exists at all other times; for there is no limitation of its exercise to a particular period. And, if it is

said that it is an incident to the power to declare war, the answer is obvious, that there is no stronger implication of it in the power to declare war than in the power to regulate commerce." To show the error of this, it is sufficient to take a single case. Suppose the "illustration drawn from a state of war" between the United States and Brazil, and suppose that gunpowder is the article declared contraband—the United States prohibiting the rest of the world from carrying it into Brazil, and Brazil prohibiting the rest of the world from bringing it here. To do this, each belligerent has an indisputable right. Now, it is held, that if this prohibitory right "exists then," that is, during *war*, it exists "at all other times," that is, during *peace*, "for there is no limitation of its exercise to a particular period." In other words, Congress, by virtue of its power to regulate commerce, can, at any time, prohibit Great Britain, France, and all other powers, from exporting a single keg of gunpowder to any port in Brazil. And what is said of gunpowder, is true of all other articles of commerce which may be declared contraband. And what is said of Brazil is true of any other foreign nation. The conclusion, then, is, that Congress, by virtue of that power to prohibit, which is claimed to be involved in the power to regulate commerce with foreign nations, can, at any time, put a stop to a very material part of the commerce of the world, "by declaring certain articles of commerce contraband." If this is not the logical conclusion of the premises, the undersigned misconceives it; but if it is, the error is evident.

But it is further held that the power to prohibit any branch of commerce by declaring certain articles contraband, is not more strongly implied "in the power to declare war than in the power to regulate commerce." This is answered by the question, what gives the declaration of contraband the force of law? Is it the mere parchment upon which it is written? The principle of international law is fixed, that such declarations, like blockades, are to be executed by force, by armies and navies, or else they are not binding, and *this is war*. Now, if this "power to prohibit" cannot be exercised except during war, and then only as an act of war, it would seem that if it is implied in either the power to declare war or to regulate commerce, it is in the former and not the latter. And if the power to prohibit the slave trade is not more strongly implied in the power to regulate commerce, than the power to declare articles contraband is, it is plainly not implied at all.

But, correctly speaking, the power to declare contraband is not implied in either. It existed at the moment the colonies went to war as an independent nation, under the Continental Congress, twelve years before the Constitution authorised Congress to regulate commerce. And having existed before the Constitution was made, it certainly cannot be derived from it. It is derived from that system of rules which reason and custom have established for the regulation of the intercourse of nations. At the present day,

what *is* contraband is in most cases already determined by the law of nations. The received doctrine is, that the *usus bellici* determine an article to be contraband, and statute law or treaty stipulations are only declaratory of the fact. Whereas, the Acts of Congress forever prohibiting the slave trade are something more than *declaratory;* and the native African, never has, in modern civilized warfare at least, been assimilated with the *usus bellici*, nor has he, as an "article of commerce," been declared contraband of war.

It is true the Federal Government may declare an article of commerce contraband which has not been heretofore considered as such; but, if it is not adapted to warlike purposes, and is evidently not designed for the military use of the other belligerent, the neutral powers affected by the consequent interference in their commerce, would rightfully oppose the enforcement of the declaration, as has frequently been done in similar cases. The truth is, the question of contraband, when arising with respect to any article not generally included in the contraband list, concerns *all neutral nations* interested in the traffic in the article, and therefore pertains more properly to international than municipal law. In the treaty of 1794, between the United States and Great Britain, a contraband list was incorporated, and the Federal Government has taken frequent occasion to admit that it was merely declaratory of the law of nations. In other treaties similar declaratory lists have been included. And perhaps it may be, that not only in this but other countries, the declaration of contraband is the exercise of a power pertaining more appropriately to the Executive Department of Government—the treaty power—than to the legislative department.

But wherever this power rests, it would seem, from its very nature, impossible that its exercise can be a regulation of commerce. The declaration of articles to be contraband, either by act or by treaty, is also a declaration of what are lawful. It is a public announcement that when the United States are at war with the power with whom the treaty is concluded, or with respect to which the act is passed, they will allow neutrals to carry on commerce with that power in all articles except those enumerated—that they will allow such articles to pass unmolested. And if it serves to *regulate* any thing falling under the federal jurisdiction, it is the conduct of army and navy officers respecting the property of neutrals. The foreign commerce designed to be regulated by Congress, is that carried on between residents of the United States and those of foreign nations, and not that which is carried on exclusively between foreign nations. But the declaration of articles to be contraband, applies solely to the latter—to property in transit between foreign ports, or owned by foreign owners, and in process of transfer to foreign buyers. How, then, can such declaration be a regulation of commerce between residents of the United States and those of foreign nations? During war residents here cannot trade with the enemy; all such commerce ceases.

It would be treason to give aid and comfort. Their property, therefore, can go only to neutral ports, and that too in neutral vessels, or vessels owned in the United States. So also with the property of neutrals coming to this country. But the declaration of contraband does not include such property; it applies exclusively to property going to the enemies' ports, or on board the enemies' ships. And since such neutral and American property is excluded from the meaning of the declaration, and its transfer is at the same time the only commerce which can lawfully be carried on *with* foreign nations during war, or in other words, during the time the declaration is of force, it is manifestly impossible that the power to declare articles contraband of war can be implied in the power to regulate commerce. And if the power to prohibit the slave trade is not more strongly implied in the power to regulate commerce, it is simply not implied at all.

It has never been claimed, with any show of argument, to be implied in any other power granted in the Constitution, and hence its exercise is a manifest usurpation, and the acts in question are wholly unconstitutional, and ought to be pronounced null and void, if not repealed by the authority which passed them.

But it may be said, admitting that the power to prohibit the slave trade is not as clearly delegated to Congress as a strict construction of the constitution would require, yet there was an *understanding* among the members of the Federal Convention that the power might be exercised after the year 1808—that this, in point of fact, was one of the "*compromises of the constitution*," and is as binding as though it were written in the compact. That there probably was some understanding among the members of the convention, the undersigned will not undertake to deny; but, if there was any, he will endeavor to show what it really must have been, after briefly adverting to a few collateral considerations.

It is sometimes erroneously said that the rendition of fugitive slaves was an equivalent agreed upon by the North for the surrender of the right to import slaves by the South. Without stopping to show the error, let it be supposed for a moment that this was so—How has the compromise been observed by the North, and the promise kept? Slaves to the value of hundreds of thousands of dollars are annually enticed away and *stolen* from their lawful owners, by citizens and incorporated societies of the hireling States, and this with the certain knowledge that the laws of their States, or the decisions of their courts, will protect them in their *theft*. If a fulfillment of the "compromise" is claimed, the claimant is resisted by a mob, and sometimes murdered by those who *know* they will escape unwhipt of justice. The officers of the Federal Government, when seeking to execute the "compromise," have been overpowered and defied. The Judge of a State court has been deposed by the Legislature of his State for discharging his sworn duty

in executing the "compromise." It has been necessary to subdue the mobs of Boston with a portion of the Federal army, in order to execute the "compromise." The Legislatures of many of the States have prohibited their citizens from keeping the promise; and in some, if the claimant escapes the mob alive, he is consigned to the *penitentiary* for a term of ten years for attempting a recovery of his property.

But not only is our property purloined; the rightful settlement of territory is denied us; and our peace and tranquility are jeopardized. The only principle of adhesion in the great political party of the hireling States, is that of undying hostility to the South. The crusade is preached from both pulpit and rostrum, and is re-echoed at the street corners and market places, and firesides. Emissaries have been sent among us to stir up revolt, and incite our peaceful population to massacre, conflagration and rapine. The most flagitious and incendiary publications have been disseminated throughout the country, in the effort to sow dissension and create disaffection among the ignorant, and to rouse the fiercer passions of the vicious. And all this by a people who claim to bind the South by the imaginary conditions of this unwritten "*compromise:*" a people who, if there ever was such a compromise, have wilfully and persistently broken their faith, and forfeited the confidence and friendship of their Southern confederates. In consequence of which, it is not only inevitable, but proper, that on the subject of slavery there can be no comity, nor even amity, between the two antagonistic and hostile sections of the Union. The South clings to a shattered wreck when faith is placed in any so-called "*compromise*" of the Constitution on this subject; and is self-sacrificing, to say the least of it, in observing any alleged obligation which is not unquestionably imposed by the Constitution itself, *according to the strictest construction.*

The undersigned, however, regards this arrangement of the framers of the Constitution in a different light from that in which it is frequently presented. It has been shown that in the Constitution there is no express grant of power to prohibit the importation of slaves, and that there is no implication of it in the power to regulate commerce. It is not claimed to be implied in any other power. The Constitution, therefore, though it *expressly prohibits the interdiction of the trade prior to the year* 1808, *does not authorize such interdiction after that time*, and any opinion based upon the supposition or belief that it does, must be erroneous. But it is clear there must have been a reason for assigning that date. And what this reason was, will now be shown.

It must be remembered that the main question before the Convention, on this subject was, whether the CONSTITUTION ITSELF should allow or prohibit the trade, and not whether *Congress* should have power to prohibit it at *its* discretion. This is a very material point, and is fully substantiated by

Luther Martin, and other members of the Convention. Official documents can establish the fact.

The subject of importing slaves, as already shown, was first brought before the Convention by the Committee of Detail, in a precautionary clause prohibiting its interdiction altogether, and to be sure that it would not be *indirectly* interdicted by a burdensome tax, it was exempted from import duties. This was thought necessary to secure the rights of South Carolina, Georgia and the Western territory, against the Northern States and Virginia and Maryland; but it was objected to, and the clause was re-committed, and finally adopted in its present form, (1st clause 9 sec. 1 art.) To understand which, it must be considered in connection with another provision of the compact, viz: That relating to amendments. And when so considered, all ambiguity and doubt is removed. Art. 5 provides "that no amendment which may be made prior to the year 1808, shall in any manner affect the *first* and *fourth* clauses in the 9th sec. of the 1st art." In both this provision, and in the clause relating to imported slaves, it will be seen that the expression "prior to the year 1808," is used. And their meaning, when considered together, as they must necessarily be, would be just the same if the expression had been omitted in the latter instance. This is probably best shown by putting the two forms of expression in juxtaposition.

As written in the Constitution.	*The expression omitted in Clause 1, Sec. 9, Art. 1.*
"The migration or importation, &c., shall not be prohibited by the Congress, *prior to the year* 1808, but a tax or duty may be imposed," &c.	"The migration or importation, &c., shall not be prohibited by the Congress, but a tax or duty may be imposed," &c.
"No amendment which may be made *prior to the year* 1808, shall in any manner affect" the above clause.	"No amendment which may be made *prior to the year* 1808, shall in any manner affect" the above clause.

To show more clearly the meaning of the Convention, a word may be said as to the other clause, with respect to which no amendment is allowed prior to the year 1808. It will be remembered that the subject of importing slaves, and of capitation and direct taxes, were originally considered together in the Convention. We here find them under the same proviso. The 4th clause of sec. 9, art. 1 of the Constitution, reads thus: "No capitation or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' This is also to be considered in connection with the proviso in the article relating to amendments. And when so considered, it will be found to mean the same as though the expression "prior to the year 1808" had been inserted after the words "shall be laid"—thus:

As written in the Constitution.	*The expression included in Clause 4, Sec. 9, Art. 1.*
No capitation or other direct tax, shall be laid, &c., &c.	No capitation, or other direct tax, shall be laid, *prior to the year* 1808, &c., &c.
"No amendment which may be made *prior to the year* 1808, shall in any manner affect" the above clause.	"No amendment which may be made *prior to the year* 1808, shall in any manner affect" the above clause.

Now, it is just as certain that the proportion in which this tax must be levied could not have been changed prior to the year 1808, as it is that the importation of slaves could not have been prohibited prior to that time. Yet, in the former, the expression "prior to the year 1808" is omitted, and in the latter inserted. But since, in consequence of the wording of the proviso, the omission or insertion of the expression does not affect the possibility of amending either clause previous to the year 1808, it follows that the insertion of it in the 1st clause does not affect its meaning, and is mere surplusage. If, indeed, there were no such proviso as that found in the 5th article, the case would be different. Or, if power to prohibit the slave trade *after the year* 1808 were granted elsewhere in the Constitution, it might be claimed that the proviso was intended only to guard against amendments until the year 1808 and had no bearing upon the object of the clause. The power being withheld previous to, and granted after that date, the question would be put to rest upon its arrival, for the intention of the Convention would be too evident to be mistaken. But since no such power is granted, and since the proviso is pointedly incorporated in the 5th art., and applies equally to another clause which has no reference to the year 1808, there is no alternative left to consider the clause and proviso in connection, as though they were one clause. By so doing we will arrive at the real intention of the Convention, which will now be explained.

The two opposite opinions in that body were, that the Constitution ought to prohibit, in terms, the entire slave trade, without leaving it to the discretion of Congress; and, on the other hand, that the subject ought to be left exclusively with the States as theretofore. Virginia may be said to have been the leader of the one, and South Carolina of the other opinion. Many of the New England delegates, and some from the Middle States, though inimical to the traffic, were opposed to jeopardizing the whole compact by insisting on a point so totally repugnant to the sentiments and interests of the more Southern States. But they knew the deep-seated prejudices of their people on the subject. In one scale they weighed the paramount importance of the Union to the commercial *interests* of their section, and in the other the difficulty of reconciling their constituents to any proposition which

morally countenanced the trade. The only basis of compromise, then, so far as they were concerned, must be such as would throw a balance in the scale of Northern commercial *interests*. The South, they saw, was divided (as now) on a mixed question of *morals* and *interest*, and had taken positions from which there was no retreat; while their section, not being directly interested in the institution of slavery, felt exempt from any *moral* responsibility for it, in spite their *moral* opposition to it; but they were united in the deepest solicitude for the expansion and prosperity of their commerce. Such was the state of feeling in the convention when Governeur Morris said he "wished the whole subject to be committed, including the clauses relating to taxes on exports, and to a navigation act. These things may form a *bargain* among the Northern and Southern States." And the commitment was accordingly made. The approaches to a compromise were thus opened. The Southern sentiment readily conceded the justness of a reasonable tax on imported slaves, but it was firm in *opposing a prohibition of their importation*. The Northern sentiment showed a willingness to let the question of importing slaves *remain in suspense*, if, by yielding that much, it could bring the South to consent to the passage of navigation acts by a plurality vote in Congress, instead of a vote of two-thirds, as previously agreed to. Northern delegates wished only to satisfy their constituents *morally*, and thought if they could point out some *future day* upon which it would be in their power to amend the constitution so that the slave trade would be prohibited, it would be sufficient, in view of the *profitable* control of navigation having been yielded to them. *They were not desirous of then giving Congress authority to prohibit the trade;* hence, such authority was not granted, for they well knew that if it were once granted, nothing would prevent its immediate exercise, a very large majority of the people in most of the States being in favor of it. And of this fact they knew Southern delegates were aware. Hence, they knew the South would never consent to a delegation of the power to Congress as an alternative. It was for this reason that Mr. Sherman, of Connecticut—one of the most influential of the New England delegates—and himself opposed to the trade, urged upon the convention that it would be "better to let the Southern States import slaves than to part with them, if they made that a *sine qua non*. * * * If the power of prohibiting the importation should be given to the General Government, it would be exercised. It would be its duty to exercise the power."

Southern delegates, by this time, perceived that in whatever form the clause should pass the convention, it could, at any subsequent time, be changed, by way of amendment, for at least ten States would be certain to vote an amendment, should any be proposed, prohibiting the importation. In agreeing, then, that some future time should be fixed, until which the

importation should be allowed, it became important to guard against any possibility of change. It was also apparent that to *prohibit* importation after the time fixed, would be just as objectionable in point of principle, as its prohibition then. On the other hand, it was thought that *the time might come* when there would be no objection, in point of interest, to the entire suppression of the trade. The question then was, how to satisfy these three conditions—*first*, to fix a time prior to which these ten States could not amend the Constitution in relation to this subject; *second*, to agree upon a period during which the number of slaves required by the South might be reasonably expected to be imported; and *third*, not to invade the principle for which South Carolina and Georgia contended, viz: that the policy of importing slaves rested exclusively with the several States, and, therefore, that the Constitution should not prohibit it contrary to the wish or interest of any. The most obvious way was that finally agreed upon; for it avoided the question of principle, and postponed the settlement of the whole subject, till such time during, or after, the year 1808, as the States then comprising the Union might think proper to amend the constitution. Mr. Rutledge effected this arrangement. He expressed the sentiments of the Southern delegates, when he assured the Convention that "he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property, and prejudiced against it." The power was therefore not given, and the whole question was left open for settlement, by amendment, during, or after the year 1808 importation being guarantied in the meantime. And until some amendment is made either prohibiting the importation of slaves, or authorizing Congress to do so, the power remains where it was when the Constitution was ratified, viz: with the States respectively.

This compromise of the Constitution, *if it may be so called*, was that the majority of Congress should be authorized to pass navigation laws. This secured the object of the North. In consideration of which, the importation of slaves was to be guarantied to the South for twenty years, against all interference or amendment by the North. After that time this special guarantee ceased, and the subject became one concerning which amendments could be proposed and adopted as provided in the Constitution. No such amendment has been made, and the whole matter reverts to the stage in which it was found, when the convention assembled in 1787, and so remains until such amendments are made.

The undersigned is aware that this is not the generally received opinion; but since it is the only one for which he can assign adequate reasons, he cannot hesitate to adopt it. The impression, so prevalent, that the understanding was, that the importation was to be allowed *until* the year 1808, *upon condition* that Congress should have power to prohibit it after that time,

54 W 3

THE LIBRARY OF CONGRESS